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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ABHINAV BHATNAGAR,)	
Plaintiff,)	Case No.: Case No. CV07-02669 (CRB)
vs.)	
)	
JASON INGRASSIA, individually and in)	
his official capacity; COUNTY OF)	
CONTRA COSTA; and CITY OF)	Date: April 25, 2007
SAN RAMON.)	Time: 10:00am
)	Honorable Charles R. Breyer
Defendants.)	
)	

**REPLY MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION *IN LIMINE***

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ARGUMENT

I. EXCLUSION OF THE PRIOR JUDICIAL FINDINGS WOULD VIOLATE PLAINTIFF'S DUE PROCESS RIGHTS TO A FAIR HEARING.

Pursuant to his constitutional rights to due process, Plaintiff Abhinav Bhatnagar is guaranteed the right to a fair trial. (U.S. Amend. V, XIV; Cal. Const. art. I, § 15; *Jinro America Inc. v. Secure Investments, Inc.* (9th Cir. 2001) 266 F.3d 993, 1007 (due process right to fair trial applies in civil, as well as, criminal proceedings. (quoting *Bird v. Glacier Elec. Coop., Inc.*, (9th Cir. 2001) 255 F.3d 1136, 1151).) As such, Plaintiff is entitled to present evidence of the prior judicial findings for the various purposes of (1) establishing his claims for malicious prosecution, false arrest and imprisonment, (2) proving his claims of municipal liability, and (3) disproving the asserted immunity defenses. With regard to some claims, the admission of the prior findings is a requisite showing necessary for Plaintiff to establish the claim.

In opposition to Plaintiff's motion *in limine*, the municipal defendants submit numerous documents relating to Defendant Ingrassia's arrest of Plaintiff on May 20, 2006. With no apparent relationship to the motion presently before this court, Defendants again seek to re-litigate the legality of Plaintiff's arrest, inundating the court with evidence relating to Plaintiff's blood alcohol level, testimony from the phlebotomist, a declaration from a forensic toxicologist, and documentation of the chain of custody of sealed vials of Plaintiff's blood. To the extent that this court allows Defendants to rehash these matters, Plaintiff should not be denied the opportunity to present evidence showing the outcome of the criminal charges brought against him. In fact, with regard to several of Plaintiff's claims, he is required to show that his criminal case was decided in his favor.

A. The Prior Findings are Necessary to Establish Plaintiff's Claims for Malicious Prosecution, False Arrest, and False Detention.

Judge Treat's findings are necessary and admissible for the purpose of proving Plaintiff's claims for malicious prosecution, false arrest, and false detention. To establish a claim for malicious prosecution, Plaintiff must prove the following elements: (1) malice, (2) no probable cause, and (3) for the purpose of denying a constitutional right. (*Freeman v. City of Santa Ana* (9th Cir. 1995) 68 F.3d 1180, 1189.) Additionally, the plaintiff must prove that the prior

proceedings were terminated in such a manner as to suggest her innocence. (*Awabdy v. City of Adelanto* (9th Cir. 2004) 368 F.3d 1062, 1068.) Such a determination depends upon the nature and circumstances of the termination and the focus of the inquiry is whether the failure to proceed with criminal charges implies a lack of reasonable grounds for the prosecution. (*Murphy v. Lynn* (2nd Cir. 1997) 118 F.3d 938, 948.)

To establish a claim of malicious prosecution, Plaintiff is entitled to present the specific findings by Judge Treat which suggest his innocence. Thus, Plaintiff should be permitted to show that the dismissal of his criminal case was based on the trial court's finding that Defendant Ingrassia lacked credibility and its implicit rejection of the deputy's testimony that he stopped Plaintiff because he made an illegal u-turn. The admission of such findings is necessary to show that Defendant Ingrassia had no basis for stopping Plaintiff. Plaintiff should not be limited to introducing the mere dismissal of the criminal charges, because such limited information does not convey the magnitude of Judge Treat's findings and why they are so suggestive of Plaintiff's innocence.

Similarly, the specific findings made by Judge Treat are also necessary to establish the elements of Plaintiff's claims for false arrest and false imprisonment, which require proof that the confinement was without lawful privilege. (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1123.) To make such a showing, Plaintiff must be permitted to introduce the specific findings by Judge Treat which show that Defendant Ingrassia falsified his reasons for stopping Plaintiff.

B. The Prior Findings are Relevant to Plaintiff's Claims of Municipal Liability

In their opposition brief, the municipal defendants do not dispute Plaintiff's argument that the prior findings are relevant for the purpose of establishing municipal liability. (Opposition Brief of County of Contra Costa and City of San Ramon ("Mun. Opp. Brief") at 12-15.) Indeed, it is well-established law in the Ninth Circuit that a police department's failure to investigate and take appropriate disciplinary action in response to repeated complaints of police misconduct is admissible for the purpose of proving a policy or custom of deliberate indifference to the danger of problem officers. (*Henry v. County of Shasta* (9th Cir. 1997) 132 F.3d 512, 518-19; *McRorie*

1 v. *Shimoda* (9th Cir. 1986) 795 F.2d 780, 784.) This is the prevailing law in numerous other
 2 circuit courts. (*See, Beck v. City of Pittsburgh* (3rd Cir. 1996) 89 F.3d 966, 973-74; *Foley v. City*
 3 *of Lowell* (1st Cir. 1991) 948 F.2d 10, 14; *Carter v. District of Columbia* (D.C. Cir. 1986) 795
 4 F.2d 116, 124; *Fiacco v. City of Rensselaer, N.Y.* (2nd Cir. 1986) 783 F.2d 319, 327-28;
 5 *Grandstaff v. City of Borger, Tex.* (5th Cir. 1985) 767 F.2d 161, 171.) Unlike most cases in
 6 which mere complaints of abuse against an officer are deemed admissible, Plaintiff's evidence is
 7 even more probative of municipal liability because he has the benefit of numerous judicial
 8 findings against Defendant Ingrassia. Because these incidents have already been adjudicated
 9 before a trier of fact, they are inherently more reliable than mere allegations of police
 10 misconduct. Despite such repeated findings against Defendant Ingrassia by three separate
 11 judges, the Sheriff's Department failed to properly respond to repeated findings and instead
 12 sought to undermine such findings under the guise of its internal affairs investigation. The
 13 admissibility of these findings is therefore critical to establishing the Department's gross and
 14 deliberate indifference to numerous findings of misconduct against Defendant Ingrassia.

15 The prior findings are also relevant to show that the municipal defendants had adequate
 16 notice that Defendant Ingrassia was a problem deputy, yet ignored the gravity of such judicial
 17 findings. Immediately after Judge Treat granted Plaintiff's motion to suppress evidence, the
 18 public defender advised the Internal Affairs Department of the court's findings and provided a
 19 transcript which included fabricated testimony by the deputy. (Affidavit of Jenny Huang in
 20 Support of Plaintiff's Motion *In Limine* ("Huang Affidavit") at ¶¶ 17, 22, Exh. 15.) About two
 21 months later, Plaintiff's counsel informed the internal affairs investigators of another adverse
 22 finding against Defendant Ingrassia by a different superior court judge. (*Id.* at ¶ 23, Exh. 16.)
 23 Despite receiving notice of these adverse judicial findings, the Sheriff's Department ignored the
 24 findings, used its investigation as a means to undermine those findings, and then concluded that
 25 the complained acts simply "did not occur". (Affidavit of Abhinav Bhatnagar in Support of
 26 Plaintiff's Motion *In Limine* ("Bhatnagar Affidavit") at ¶ 32, Exh. 1.) The Department's failure
 27 to respond to these judicial findings is also admissible for the purpose of showing that they had a
 28 policy and custom of ignoring evidence of his misconduct by Defendant Ingrassia.

1 C. The Prior Findings are Admissible Against Defendant Ingrassia.

2 As discussed above, Judge Treat's findings are necessary to establish Plaintiff's claims
 3 against Defendant Ingrassia for malicious prosecution, false arrest, and false imprisonment. In
 4 an untimely opposition to Plaintiff's Motion *In Limine*, Defendant Ingrassia does not dispute that
 5 the prior findings are relevant as to the deputy's character and for the purpose of establishing his
 6 pattern, habit, and absence of mistake in fabricating the basis for stopping motorists.¹ (*See*,
 7 Plaintiff's Motion *In Limine* at 9-10; Opposition Brief of Defendant Ingrassia ("Ingrassia Opp.
 8 Brief.") Rather, Defendant Ingrassia asks this court to categorically deny the doctrine of offensive
 9 collateral estoppel, although the U.S. Supreme Court has long held that trial courts have broad
 10 discretion to determine when offensive collateral estoppel should apply. (Ingrassia Opp. Brief at
 11 6-7; *Parklane Hosiery Co., Inc. v. Shore* (1978) 439 U.S. 322, 331; *see also, Patzner v. Burkett*
 12 (8th Cir. 1985) 779 F.2d 1363, 1369, fn 7.)

13 Defendant Ingrassia contends that by permitting criminal defendants to use favorable
 14 findings from their criminal trial in an offensive manner in subsequent civil litigation, this court
 15 would open the floodgates to a wave of civil litigation. (Ingrassia Opp. Brief at 7-8.) However,
 16 this assumes that criminal courts routinely make adverse findings of credibility against police
 17 officers, much less the same officer and that suppression motions are regularly granted. To the
 18 contrary, Plaintiff's case presents a highly unusual set of facts in which three separate judges
 19 made adverse findings against Defendant Ingrassia and on that basis, dismissed the criminal
 20 cases in which he was the arresting officer. Given these extraordinary circumstances, Plaintiff
 21 should be permitted to present these facts and prior findings for the purpose of showing that the
 22 Sheriff's Department was grossly and deliberately indifferent to repeated warnings from the
 23 criminal courts about this deputy.

24
 25
 26 ¹ Defendant Ingrassia did not timely file an opposition brief to Plaintiff's Motion *In*
 27 *Limine*, which was due on April 4, 2008. Without seeking leave to file a late brief, Defendant
 28 Ingrassia did not file an opposition brief until one week later on April 10, 2008, the same day
 Plaintiff's reply brief is due. Because Plaintiff has had insufficient time to respond to the
 deputy's opposition brief, it should be stricken from the record.

1 D. The Prior Findings are Relevant for the Purpose of Disproving
2 Asserted Defenses of Immunity.

3 In Answers filed by the Defendants in this action, they each assert various immunities in
4 defense to Plaintiff's claims. To disprove these immunity defenses, Plaintiff is required to
5 show that Defendants' did not reasonably believe their conduct to be lawful. (*Hervey v. Estes*,
6 (9th Cir. 1995) 65 F.3d 784, 788.) To defeat state law immunities, Plaintiff is further required
7 to show that the Defendants' conduct was not discretionary and within the scope of
8 employment. (Cal. Govt. Code § 820.2.)

9 As applied to the unique facts underlying this case, Plaintiff will be required to show that
10 Defendants are not immune from liability because the deputy's intentional fabrication of
11 evidence demonstrates that his conduct was not the type of discretionary conduct that is ordinary
12 protected by the defense of immunity. Moreover, the adverse findings against Defendant
13 Ingrassia's credibility further lend support that the municipal defendants should not be immune
14 from liability because the deputy's testimony was fabricated. In the absence of false statements,
15 courts have found that the lack of probable cause is enough to deny a claim of qualified
16 immunity. For instance, in *Malley v. Briggs*, the United States Supreme Court held that an
17 officer who applied for a warrant without probable cause was not protected by immunity because
18 his claimed basis for probable cause was not objectively reasonable. (*Malley v. Briggs* (1986)
19 475 U.S. 335, 340-41.)

20 To defeat the immunity defenses, Plaintiff will need to show that Defendant Ingrassia's
21 claimed reason for stopping Plaintiff was not only unreasonable, it was a complete fabrication.
22 To make such a showing, Plaintiff should not bear the burden of duplicating the evidence
23 adduced at his criminal trial, particularly when at least one of his key witnesses has been
24 subjected to intense harassment and retaliation for testifying in Plaintiff's favor. (*See*, Plaintiff's
25 Motion for Protective Order Pursuant to Fed.R.Civ.Pro., rule 26(c), filed on 11/27/07.)
26 Moreover, Plaintiff's witnesses have already been required to appear in several hearings in the
27 Department of Motor Vehicles and in criminal court. To avoid the additional burden of
28

appearing in yet another proceeding that is likely to elicit police harassment and retaliation, Plaintiff should be permitted to rely upon the testimony and findings in the prior proceedings.

II. THE PRIOR JUDICIAL FINDINGS SHOULD BE ADMITTED AS EVIDENCE AGAINST ALL DEFENDANTS

A. The Prior Judicial Findings Do Not Constitute Hearsay Evidence

In an apparent recognition that the prior findings are relevant to Plaintiff's claims of municipal liability, the municipal defendants instead argue that the prior judicial findings should be excluded as hearsay evidence. This argument assumes that Plaintiff seeks to introduce these findings for the purpose of establishing the truth of the judicial findings. However, it is not Plaintiff's objective to substitute the prior findings of credibility for the jury's ultimate role in assessing the credibility of Defendant Ingrassia. Rather, as discussed in thorough detail above in Section I, Plaintiff seeks to admit the prior findings for various reasons that have nothing to do with the truth of those findings. For instance, the prior findings are admissible to prove Plaintiff's claims of malicious prosecution, false arrest, and false detention, to disprove asserted defenses of immunity, and to establish various theories of municipal liability. In these circumstances, a prior finding is not accurately characterized as hearsay evidence. (*United States v. Boulware* (9th Cir. 2004) 384 F.3d 79, 806 (evidence of prior judgment was not hearsay when offered to show the judgment's legal effect and not for the truth of the matter asserted.)

In support of its hearsay argument, the municipal defendants rely primarily on the findings in *United States v. Sine* (9th Cir. 2007) 493 F.3d 1021. (Mun. Opp. Brief at 13-14.) In that case, credibility findings by a state court judge in a related civil action against the defendant were repeatedly recited in his subsequent criminal prosecution for mail fraud. The Ninth Circuit held that the prosecutor's repeated use of the judge's adverse findings to cross-examine witnesses constituted inadmissible hearsay because they had little probative value and were introduced for no reason other than to taint the defendant's credibility before the jury. (*Id.* at 1035.) The court further concluded that although such evidence was highly prejudicial, it did not amount to plain error. (*Id.* at 1033-35, 1038-40.)

1 Unlike the questionable motives for such evidence in *United States v. Sine*, Plaintiff does
 2 not seek to admit the prior judicial findings for the purpose of influencing the jury's assessment
 3 of Defendant Ingrassia's credibility. Rather, evidence of the prior findings is necessary evidence
 4 to establish numerous claims asserted by Plaintiff. Moreover, this case is unlike the facts in
 5 *United States v. Sine*, where the court noted that the prosecution could have proved the facts
 6 underlying the judge's finding in a less prejudicial manner. (*Id.* at 1035.) It has been well-
 7 documented throughout this case that Defendant Ingrassia and other police officers have engaged
 8 in a campaign of police harassment and retaliation against Plaintiff and who has challenged the
 9 deputy's misconduct.. (Affidavits of Richard Ha, Diana Garrido, Tim Ahearn, Abhinav
 10 Bhatnagar, and Jenny Huang, submitted in Support of Plaintiff's Motion for Protective Order
 11 Pursuant to Fed.R.Civ.Pro., rule 26(c), filed on 11/27/07.) Given the history of police
 12 intimidation in this case, Plaintiff does not have the same ability to recreate the facts underlying
 13 Judge Treat's findings without eliciting understandable concerns about further retaliation from
 14 the police.

15 B. The Probative Value of the Prior Findings Outweigh Any Prejudicial Impact

16 Defendants contend that admission of the prior judicial findings will be unfairly
 17 prejudicial and should therefore be excluded pursuant to Fed. R. Evid., rule 403. (Mun. Opp.
 18 Brief at 13-14.) Defendant Ingrassia further claims that pursuant to Rule 403, he is entitled to
 19 relitigate the criminal charges alleged and subsequently dismissed against Plaintiff. (Ingrassia
 20 Opp. Brief at 9.) As the Ninth Circuit has recognized, judicial findings are not always
 21 inadmissible and in some situations, their probative value outweighs any prejudicial impact.
 22 (*United States v. Sine, supra*, 493 F.3d at 1034; *see also*, Fed.R.Evid., rule 803(22) advisory
 23 committee note (noting that courts are increasingly reluctant to reject in total the validity of the
 24 law's factfinding processes, particularly when collateral estoppel does not apply).) Here, the
 25 prior findings carry substantial probative value with numerous aspects of Plaintiff's case, the
 26 denial of which would violate Plaintiff's right to prove his claims by way of a fair trial.
 27 Therefore, this case presents precisely one of those situations in which the probative value of
 28 admitting the prior findings far outweighs any prejudicial impact to Defendants.

To minimize the prejudicial impact, if any, to the Defendants, they are entitled to request bifurcation of the trial in the event they can show that evidence that may be admissible against the municipal defendants would not also be admissible against Defendant Ingrassia. (Fed.R.Civ.Pro., rule 42(b).) Defendants can also seek limiting instructions to guide the jury on the limited purpose for which the prior findings are admitted.

III. THE DISTRICT ATTORNEY'S SWORN STATEMENT OF INSUFFICIENT PROBABLE CAUSE TO SUPPORT PLAINTIFF'S ARREST IS ADMISSIBLE

In their opposition brief, the municipal defendants summarily argue that a sworn statement submitted by an Assistant District Attorney to the Department of Motor Vehicles ("DMV") should be excluded as hearsay evidence.² (Mun. Opp. Brief at 15.) As a preliminary matter, it is significant to note that county counsel artfully describes the document at issue as a "letter" by the district attorney. (*Id.* at 15:8.) However, the document is more accurately described as a sworn statement signed by Assistant District Attorney Douglas Foley under penalty of perjury on 1/5/07, in which he states that "probable cause for the stop was insufficient." (*See*, Huang Affidavit in Support of Plaintiff's Motion *In Limine* ("Huang Affidavit"), Exhibit 5.) The document is on DMV letterhead, it is entitled, "Administrative Per Se Notice of Failure to File Criminal Charges," and it is labeled as DMV's Form No. DS 702. (*Id.*) Pursuant to Cal. Vehicle Code § 13353.2(f), the document contained in Exhibit 5 is a business record maintained by the DMV for the purpose of explaining the district attorney's reason for failing to prosecute criminal charges against the driver in question. (Cal. Veh. Code § 13353.2(f).) This business record is submitted for consideration in a renewed right to request an administrative hearing before the DMV, for the purpose of determining whether the driver's license suspension should be reversed. (*Id.*)

² In Plaintiff's Notice of Motion *In Limine*, Plaintiff inadvertently listed Mr. Foley's sworn statement as evidence for which Plaintiff seeks an *in limine* ruling. (Plaintiff's Notice of Motion *In Limine*, filed on 3/14/08, at 2:15-17.) Plaintiff's counsel subsequently informed Defendants' counsel of the error contained in the Notice of Motion and indicated that it would not seek an *in limine* ruling on this document at this time. (Affidavit of Jenny Huang in Support of Plaintiff's Reply Motion *In Limine* "Huang Reply Affidavit" at ¶¶ 2-3.) Nevertheless, county counsel apparently seeks, and Plaintiff agrees, that an *in limine* ruling on the admissibility of Mr. Foley's sworn statement is appropriate at this time.

1 The District Attorney's sworn statement is relevant to Plaintiff's claims against the
 2 municipal defendants. First, it provided notice to the Sheriff's Department that Defendant
 3 Ingrassia authored false police reports and repeatedly provided false testimony under penalty of
 4 perjury. As the statement indicates, the prosecution, as well as Judge Treat, did not believe
 5 Defendant Ingrassia had probable cause to stop or arrest Plaintiff. Mr. Foley's statement is
 6 further evidence of the deliberate indifference demonstrated by the Sheriff's Department in its
 7 failure to properly investigate and discipline Defendant Ingrassia for such misconduct. Mr.
 8 Foley's sworn statement is also admissible against Defendant Ingrassia, for the purpose of
 9 challenging his ongoing efforts to fabricate his reason for stopping Plaintiff on the night of the
 10 arrest. Specifically, the statement is admissible to show that the deputy had an improper motive,
 11 intent, and absence of mistake when he stopped Plaintiff based on the fabricated claim that he
 12 made an illegal u-turn.

13 Pursuant to the Federal Rules of Evidence, the District Attorney's sworn statement does
 14 not constitute hearsay because it is a party admission. (Fed.R.Evid., rule 801(d)(2).) Although
 15 Mr. Foley is not a party to the present proceeding, he is a person authorized by Contra Costa
 16 County to make a statement concerning the subject at issue. (Fed.R.Evid., rule 801(d)(2)(C).)
 17 Alternatively, Mr. Foley is an agent or servant of Contra Costa County who provided a statement
 18 concerning a matter within and during the scope of his employment. (Fed.R.Evid., rule
 19 801(d)(2)(D).)

20 Alternatively, the District Attorney's sworn statement is admissible as a hearsay
 21 exception. Regardless of whether Mr. Foley is available as a witness at trial, the sworn statement
 22 is admissible as a business record of the DMV. (Fed.R.Evid., rule 803(7); Cal. Veh. Code §
 23 13353.2(f).) Pursuant to state statute, this DMV record is kept in the course of DMV's regularly
 24 conducted business activity pertaining to administrative *per se* hearings. (Cal. Veh. Code §
 25 13353.2(f).) Moreover, the statute mandates that it is the agency's regular practice to require
 26 prosecutor's to complete this record for consideration at the administrative hearing. (*Id.*)

27 In the event that Mr. Foley is not available at trial, his statement will be admissible as a
 28 statement against interest. (Fed.R.Evid., rule 804(b)(3).) Mr. Foley's statement that "probable

cause for the stop was insufficient” is one that was clearly against his interest as a prosecutor. (Huang Affidavit, Exhibit 5.) Although Judge Treat had already granted the suppression motion and dismissed the criminal charges against Plaintiff, the prosecutor was still entitled to seek review of Judge Treat’s suppression order. (Cal. Penal Code § 1538.5(m).) Mr. Foley’s statement further suggests reliability and trustworthiness because it is an admission that has the tendency of exposing the prosecutor or his employer to civil liability.

IV. THIS COURT SHOULD GIVE PRECLUSIVE EFFECT TO THE PRIOR JUDICIAL AND ADMINISTRATIVE FINDINGS

In their opposition briefs, Defendants grossly mischaracterize Plaintiff’s suppression hearing as Plaintiff’s “spinning and manipulating of the California justice and administrative systems.” (Ingrassia Opp. Brief at 1.) Defendant Ingrassia complains that he was not able to cross-examine any witnesses at any of the prior proceedings, although the record in this case documents his longstanding efforts to harass, intimidate, and retaliate against Plaintiff and at least one of his key witnesses. (*Id.* at 2; Affidavits of Richard Ha, Diana Garrido, Tim Ahearn, Abhinav Bhatnagar, and Jenny Huang, submitted in Support of Plaintiff’s Motion for Protective Order Pursuant to Fed.R.Civ.Pro., rule 26(c), filed on 11/27/07.) The deputy further complains he was not represented by counsel in the prior proceedings and that no one ever warned the deputy that perjured testimony could “place him in jeopardy or could be prejudicial to him in any subsequent civil action.” (Ingrassia Opp. Brief at 2.) Similarly, the municipal defendants assert that they were denied the opportunity to call witnesses, present evidence, or otherwise participate in Plaintiff’s suppression hearing. (Mun. Opp. Brief at 4-5.)

Defendants’ attempts to challenge the validity of Plaintiff’s suppression hearing and the validity of Judge Treat’s findings are seriously undermined by the simple fact that the prosecution had the opportunity, but declined, to seek review of Judge Treat’s suppression order. (Huang Reply Affidavit at ¶ 4.) In the absence of any such appeal, Judge Treat’s suppression order became final as a matter of law. (*Ayers v. City of Richmond* (9th Cir. 1990) 895 F.2d 1267, 1271-72.) Defendants claim that they had no ability to influence, communicate, or collaborate

1 with the District Attorney's Office during Plaintiff's criminal case, but the benefit of future
2 discovery will prove otherwise.

3
4 **CONCLUSION**

5 For the reasons stated above, Plaintiff respectfully requests that this court issue an order
6 granting his motion *in limine* in its entirety.

7
8 Date: April 11, 2008
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